

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT MACIEJEWSKI,

Defendant-Appellant.

UNPUBLISHED

April 18, 2006

No. 259085

Wayne Circuit Court

LC No. 04-006284-01

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ

PER CURIAM.

Defendant appeals as of right his jury trial conviction for second-degree murder, MCL 750.317. He received a sentence of 10 to 25 years in prison. We affirm.

Defendant brings forth several preserved and unpreserved claims of prosecutorial misconduct. Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Unpreserved issues are reviewed for plain error that affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). Appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

The record reflects that defendant's claims of prosecutorial misconduct are either without merit, unpreserved, or harmless because the court sustained objections and gave curative instructions. He has not demonstrated that a pattern of misconduct deprived him of a fair trial or

led to a conviction despite his actual innocence.¹ The jury relied on weighty evidence that implicated defendant in the crime.

Defendant's claim of ineffective assistance of counsel must also fail. Because defendant did not move for a new trial or a *Ginther*² hearing, this Court's review of his claim of ineffective assistance of counsel is limited to mistakes apparent from the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A court first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* Questions of constitutional law are reviewed by this Court de novo. *Id.*

For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight.

¹ The conduct of the prosecutor here did not rise to the level of reversible error, but neither did it rise to the level of conduct expected of the bar and more particularly of prosecuting attorneys. The trial judge carefully and thoroughly addressed and corrected all of the prosecutor's many errors, preserving the fairness of the trial in order that the jury might follow the weight of the evidence in convicting this defendant. For example, the prosecutor asked defendant to "give the jury a reason why [a specific witness] would lie"; the court sustained the obvious objection, finding defendant lacked foundation for knowing why the witness might have lied or not lied. The prosecutor asked defendant why two other witnesses were lying, and the court upheld objection. Asking a defendant to comment on the credibility of witnesses is error, but not reversible error if cured by proper instruction. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985) on rem *People v McWhorter*, 150 Mich App 826; 389 NW2d 499 (1986). The prosecutor also asked a witness police officer whether defendant made a particular statement after he was arrested, defense counsel objected, and the court instructed the jury that it is inappropriate for the prosecutor to comment on defendant's post-arrest silence or statement since he has the right to remain silent. The prosecutor played for the jury a 911 call made by an officer on the scene, which call was cut off by the operator, and the prosecutor speculated about what defendant had said to the officer that led to both the content of the call and the content that might have followed had the call not been cut off. Defendant properly objected to the prosecutor assuming facts not in evidence, and the court again gave a curative instruction to the jury. The trial transcript includes several similar examples of conduct that, if uncured at trial, could be grounds for a valid appeal. But for the curative instructions given repeatedly throughout this trial, the prosecutor could have prejudiced the jury. Attorneys are advised to refrain from conduct that requires such frequent intervention of the trial judge to maintain the integrity of the trial.

² *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

People v Matuszak, 263 Mich App 42, 58; 687 NW2d 342 (2004). As for prejudice, a defendant must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” *Mitchell, supra* at 167. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland, supra* at 694.

Defendant claims ineffective assistance of counsel based on his counsel’s failure to object to the jury instructions and request instructions for voluntary manslaughter and imperfect self-defense. His argument is unpersuasive because although instructions for manslaughter “must be given if supported by a rational view of the evidence,” here neither lesser included offense is supported by a rational view of the evidence, and any request for either instruction would have been properly denied. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). An attorney is not ineffective for failing to make a futile objection upon which the court would have ruled adversely. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Whether a specific instruction is supported by the evidence and should be given is reviewed for an abuse of discretion. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

Voluntary manslaughter is murder without malice. *Mendoza, supra* at 535. The malice is negated by the presence of provocation and heat of passion. *Id.* at 540. Voluntary manslaughter requires that the defendant killed in the heat of passion, that the passion was caused by adequate provocation, and that there was not a lapse of time during which a reasonable person could control his passions. *Id.* at 534. Here defendant claimed he was not angry at the victim, negating any heat of passion claim.

Imperfect self-defense mitigates second-degree murder to manslaughter when a defendant would have been entitled to claim self-defense if the defendant had not been the initial aggressor. *People v Kemp*, 202 Mich App 318, 323; 508 NW2d 184 (1993). Here defendant denied he was the initial aggressor, thereby negating any imperfect self-defense claim with his own testimony.

Defendant’s own theory of the case and his testimony preclude any claim of voluntary manslaughter or imperfect self-defense. Defendant presented a case in which he claimed that he acted in self-defense, did not intend to kill or injure, and was responding to initial aggression from the victim. He denied that he was angry at the victim, instead maintaining that he only wanted to protect himself and did not intend to hurt the victim. A rational view of the evidence would find no support for an instruction of voluntary manslaughter or for imperfect self-defense. Because any request for instructions contrary to the evidence before the court would have been denied for lack of support in the evidence, defendant’s counsel was not constitutionally ineffective for failure to make such a request. *Fike, supra* at 182.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald